Supreme Court, U. S.
FILED
MAY 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-759

HON. EDWIN EDWARDS, *et al.*,

Appellants,

—v.—

MARSHA B. HEALY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR APPELLEES

RUTH BADER GINSBURG
MELVIN L. WULF
KATHLEEN PERATIS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

GEORGE M. STRICKLER, JR.
344 Camp Street
Suite 1100
New Orleans, Louisiana 70130

Attorneys for Appellees

INDEX

PAGE

Opinion Below 1

Jurisdiction 1

State Constitutional and Statutory Provisions Involved 2

Question Presented 3

Statement of the Case 3

ARGUMENT:

Introduction 5

I. Female Litigants in Civil Cases Pending in Louisiana State Courts Have Standing to Challenge the Constitutionality of the Louisiana Jury Selection System Whereby Women May Not Serve on Juries Without Filing a Written Declaration of Their Desire to Do So 6

II. The Louisiana Jury Selection System Discriminates Invidiously on the Basis of Sex in Violation of the Equal Protection Clause of the Fourteenth Amendment 9

A. Women are a cognizable group excluded from jury service by Louisiana's jury selection system 9

B. Louisiana's "benign dispensation" serves to keep women in their place 12

PAGE

III. By Destroying the Possibility That the Jury Will Reflect a Representative Cross-Section of the Community, the Louisiana Jury Selection System Infringes a Fundamental Right and Violates the Due Process Clause of the Fourteenth Amendment 15

IV. The Gender Criterion Employed by Louisiana to Determine Inclusion of Individuals in Jury Venires Bears No Fair and Substantial Relationship to Any Legitimate State Objective 17

CONCLUSION 23

TABLE OF AUTHORITIES

Cases:

Alexander v. Louisiana, 405 U.S. 625 (1971) 11, 13, 22
Apodaca v. Oregon, 406 U.S. 404 (1972) 9

Baker v. Carr, 396 U.S. 186 (1962) 7, 8
Ballard v. United States, 329 U.S. 187 (1946) 10, 22
Broadway v. Culpepper, 439 F.2d 1253 (5th Cir. 1971) 14
Brown v. New Jersey, 175 U.S. 172 (1899)..... 15
Carter v. Jury Commission, 396 U.S. 320 (1970) 5, 7, 9

Data Processing Service v. Camp, 397 U.S. 150 (1969) 7
De Funis v. Odegaard, 42 U.S.L.W. 4578 (1974) 12
De Kosenko v. Brandt, 63 Misc. 2d 895, 313 N.Y.S.2d 827 (1970) 13
Duncan v. Louisiana, 391 U.S. 145 (1968) 15

PAGE

Flast v. Cohen, 392 U.S. 83 (1968) 7
Frontiero v. Richardson, 411 U.S. 677 (1973) 5, 7, 12, 14, 20

Goldblatt v. Board of Education, 52 Misc. 2d 238, 275 N.Y.S.2d 550 (1966), aff'd, 57 Misc. 2d 1089, 294 N.Y.S.2d 272 (1968) 13
Grimes v. United States, 391 F.2d 709 (5th Cir. 1968) 10

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 8
Hodnett v. Slayton, 343 F. Supp. 1142 (W.D. Va. 1972) 11
Hoyt v. Florida, 368 U.S. 57 (1961) .....*passim*

Kahn v. Shevin, 42 U.S.L.W. 4591 (April 24, 1974) 12

Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966) 10

McGowan v. Maryland, 366 U.S. 420 (1961) 8
McManaman v. United States, 327 F.2d 21 (10th Cir. 1964) 10
Memorial Hospital v. Maricopa County, 94 S. Ct. 1076 (1974) 15

Peters v. Kiff, 407 U.S. 493 (1972) 5, 10, 14, 15, 16, 17

Reed v. Reed, 404 U.S. 71 (1971) 5, 7, 12, 20

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 15
Smith v. Texas, 311 U.S. 128 (1941) 15

PAGE

State v. Daniels, 262 La. 475, 263 So. 2d 859 (1972) 14
State v. Madison, 240 Md. 265, 213 A.2d 880 (1965) 10

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) 10, 15

United States v. Pentando, 463 F.2d 355 (5th Cir. 1972) 10
United States v. SCRAP, 412 U.S. 669 (1973) 7, 8
United States v. Zirpolo, 450 F.2d 564 (3d Cir. 1970) .. 10, 19

White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) 10
Wiesenfeld v. Secretary of Health, Education and Welfare, 367 F. Supp. 981 (D.N.J. 1973) 12

Constitutions:

Sixth amendment to the Constitution of the United States 15
Fourteenth amendment to the Constitution of the United States 7, 9, 15

La. Const. Art. VII, §41 .....2, 4, 10

Federal Statutes:

28 U.S.C. §1252 2
28 U.S.C. §1862 19
42 U.S.C. §1983 3

State Statutes:

Acts, State of Louisiana, Regular Session 1972, Vol. II 1204-5 2
Alaska Stat. §§9.20.010, 9.20.030 20

PAGE

5A Md. Ann. Code art. 51 §§1 et seq. 20
5 N.D. Cent. Code §§27-09.1 et seq. 20
Fla. Stat. Ann. §40.01 as amended, Laws 1967, c. 67-154, §1 4
4 Colo. Rev. Stat. Ann. §§78-1 et seq. 20
4 N.M. Stat. Ann. §§19-1-1 et seq. 20
14 Me. Rev. Stat. Ann. §§1201 et seq. 20
Ill. Ann. Stat. Ch. 78 §§1 et seq. (Smith-Hurd) 20
Ind. Ann. Stat. §4-7115 20
Iowa Code Ann. §§607.1 et seq. 20
La. Code of Crim. Proc., Art. 402 2
La. Code of Crim. Proc., Art. 403 2
LSA-R.S. 13:3055 (repealed) 2
LSA-R.S. 13:3056 2
Mich. Comp. Laws Ann. §§600.1306, 600.1307 20
NJSA 2A:69-2(g) 21
1 Ky. Rev. Stat. §§29.025, 29.035 20
1 Nev. Rev. Stat. §§6.010 et seq. 20
1 Ore. Rev. Stat. §§10.010 et seq. 20
1B N.C. Gen. Stat. §§9-3 et seq. 20
Rev. Codes of Mont. §93-1304 21
7 Ariz. Rev. Stat. Ann. §§21.201, 21.202 20
7 Hawaii Rev. Laws §§609-1 et seq. 20
7 Mont. Rev. Codes Ann. §§93-1301 et seq. 20
7 S.D. Code §§16-13-10 et seq. 20
17 Pa. Stat. §1279 20
10 Del. Code Ann. §§4505 et seq. 20
3A Kan. Stat. Ann. §§43-155 et seq. 20
3B Ark. Stats. Ann. §§39.101 et seq. 20
13 Cal. Code Civ. Proc. §§198 et seq. 20
2 Miss. Code Ann. §§1762 et seq. 20

PAGE

2 Idaho Code Ann. §§2-201 et seq. 20
2 Va. Code Ann. §§8-208.2 et seq. 20
2A N.J. Rev. Stat. §§69-1, 69-2 20
Vt. Stat. Ann. tit. 12, App. VII, Pt. 1, R. 25 §27 20
W. Va. Code Ann. §§52-1-1 et seq. 20
Wis. Stat. Ann. §§255.01, 270.16 20

Other Authorities:

Bureau of the Census, 1970 Census of the Population, General Social and Economic Characteristics, Final Report PC(1)—C20—Louisiana 195 18-19
Cottle, The Prejudice Against Women Lawyers: How Can It Be Overcome?, 21 Case & Com. 371 (1914) 12
Davidson, Ginsburg & Kay, Cases and Materials on Sex-Based Discrimination (1974) 21
Hayghe, Labor Force Activity of Married Women, U.S. Department of Labor, Monthly Labor Review, Table 4 (April 1973) 18
Holton, Administrator, Commission on the Status of Women, State Department of Labor of Louisiana, Women Workers in Louisiana, 1970 (July, 1972) 19, 21
Johnson & Knapp, Sex Discrimination by Law: A Study in Judicial Perspectives, 46 N.Y.U.L. Rev. 675 (1971) 14, 21
Library of Congress Legislative Reference Service, American Law Division, June 10, 1970, report to the Senate, in Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 725.27 (1970) 4

PAGE

Nagal & Weitzman, Women as Litigants, 23 Hastings L.J. 192 (1971) 8, 13, 17
Note, 12 St. John's L. Rev. 172 (1937) 8
Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601 (1968) 8
Statistical Abstract of the United States 1972 (93d ed.) 21
White, Selecting the Jury, in Appleman, Successful Jury Trials 123 (1952) 17
Women's Bureau, U.S. Department of Labor, Highlights of Women's Employment and Education (1973) 18
Women's Bureau, U.S. Department of Labor, Women in Labor Force (Nov. 1973) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-759

HON. EDWIN EDWARDS, *et al.*,

Appellants,

—v.—

MARSHA B. HEALY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR APPELLEES

Opinion Below

The opinion of the United States District Court for the Eastern District of Louisiana is reported at 363 F.Supp. 1110 (1973).

Jurisdiction

On September 7, 1973, the United States District Court for the Eastern District of Louisiana, sitting as a three-judge court, entered the judgment which is the subject of this appeal. Notice of Appeal to the Supreme Court of the United States was filed on September 18, 1973. The Jurisdictional Statement was filed on November 12, 1973, and Ap-

pellees' Motion to Affirm was filed on November 28, 1973. Probable jurisdiction was noted on February 19, 1974. Jurisdiction to review this decision on appeal is conferred by 28 U.S.C. §1253.

State Constitutional and Statutory Provisions Involved

La. Const. Art. VII, §41*

> The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service . . . .

La. Code of Criminal Procedure, Art. 402

> A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

---

* Statutory provisions pursuant to La. Const. Art. VII, §41 were revised by Acts 1972, No. 523. Acts, State of Louisiana, Regular Session 1972, Vol. II 1204-5. LSA-R.S. 13:3055 was repealed and a special exemption for women only was added to LSA-R.S. 13:3056 and La. Code of Criminal Procedure, Art. 403, covering, *inter alia*, "any woman who has a child under sixteen years of age under her care." However, the "volunteers only" provision for women was retained in the constitution; it is still operative in both civil and criminal cases, along with a qualified statutory exemption permitting women who volunteer for service to claim exemption when actually called to serve.

Question Presented

Whether, as the court below held, all litigants are denied due process of law and female litigants are additionally denied the equal protection of the laws by a jury service exemption for women different from that available for men and on the basis of a gender criterion that is wholly unrelated to the objectives of jury service.

Statement of the Case

This class action was commenced on March 16, 1973 pursuant to 42 U.S.C. §1983 to declare unconstitutional and enjoin the enforcement of the Louisiana jury selection system whereby women may not serve on juries without filing a written declaration of their desire to do so. No issues of fact were contested; the parties entered into a stipulation on June 25, 1973 that constituted the basis for adjudication. See Appendix pp. 82-84, 111-12, 120, 165.

The stipulation recites that "[f]ifty-three percent (53%) of the population of persons eligible for jury service in St. Tammany Parish and Washington Parish [the two parishes in which named plaintiffs reside] is female," that in St. Tammany Parish "no more than ten percent (10%) of the persons in the general venire or jury wheel are female," and that in Washington Parish, to the knowledge of the Clerk of Court, "no more than two women . . . have [ever] requested that they be made eligible for jury service" and "only on one occasion has a woman been included in a petit jury venire." Further, the stipulation includes a list of fourteen jury drawings made in St. Tammany Parish in re-

cent years. In five of the drawings, no women were drawn; in two, women represented .05% of the names drawn; in four, 1%; in two, 2%; and in one, where the representation of women was highest, 4%.

Also stipulated were the facts that one of the named plaintiffs "has filed a civil damage action . . . in Washington Parish and has requested a jury trial" and that another of the named plaintiffs "is preparing to file a civil damage action in St. Tammany Parish [and] will request a jury trial."

In a unanimous decision rendered August 31, 1973, judgment entered thereon September 7, 1973, the three-judge district court declared unconstitutional and enjoined the enforcement of Louisiana Constitution Art. VII, §41, and legislation enacted pursuant to it, on the ground that exclusion of women from jury service unless they file a written declaration of their desire to serve denies all litigants due process of law and deprives female litigants of their right to equal protection.

The court below recognized that in *Hoyt* v. *Florida*, 368 U.S. 57 (1961), this Court upheld a Florida scheme* almost identical to the Louisiana system challenged as unconstitutional in the case at bar. However, on the basis of the stipulation of facts, demonstrating that under the Louisiana jury selection system service by women is virtu-

* Florida amended the statute at issue in *Hoyt* in 1967. Fla. Stat. Ann. §40.01, as amended, Laws 1967, c. 67-154, §1. By 1970, Louisiana was the only state to retain "volunteers only" legislation on jury service by women. Library of Congress Legislative Reference Service, American Law Division, June 10, 1970 report to the Senate, in Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 725-27 (1970).

ally non-existent, and following the direction implicit in this Court's decisions in *Reed* v. *Reed*, 404 U.S. 71 (1971), *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), *Peters* v. *Kiff*, 407 U.S. 493 (1972), and *Carter* v. *Jury Commission*, 396 U.S. 320 (1970), the court concluded:

> When today's vibrant principle is obviously in conflict with yesterday's sterile precedent, trial courts need not follow the outgrown dogma. Hence we consider that *Hoyt* is no longer binding. 363 F.Supp. at 1117.

On September 10, 1973, the district court stayed execution of the judgment pending this Court's disposition on appeal.

ARGUMENT

Introduction

Louisiana's jury selection system, by requiring exemption for women "different from that available for men under substantially similar circumstances, and on the basis of a sexual criterion that is wholly unrelated to the objectives of jury service," 363 F.Supp. at 1117, denies all litigants due process of law and additionally denies female litigants the equal protection of the laws. The court below so concluded on the basis of stipulated facts demonstrating that the "benign dispensation" accorded women results in jury panels that never include more than five percent females, and frequently less. 363 F.Supp. at 1111.

I.

Female Litigants in Civil Cases Pending in Louisiana State Courts Have Standing to Challenge the Constitutionality of the Louisiana Jury Selection System Whereby Women May Not Serve on Juries Without Filing a Written Declaration of Their Desire to Do So.

Three separate classes of plaintiffs joined in this action: (1) females eligible for jury service whose exclusion from responsibility to serve types them as subordinate citizens, members of "the second sex," persons whose assistance in the administration of justice is not needed by the community; (2) males eligible for jury service, subject to a double burden because similarly situated females are not required to serve; (3) female litigants in civil cases in state court, denied any possibility of a jury drawn from a representative cross-section of the community, because women, fifty-three percent of the population of persons eligible for service, are almost totally absent from the jury pool.

Appellees herein representing female litigants with suits pending in state courts plainly have standing to sue. The court below pretermitted this threshold issue with respect to the two other classes. 363 F.Supp. at 1112. Accordingly, the standing issue at this juncture may be treated summarily.

The test for standing in controversies of this kind is twofold: (1) the interest asserted must be arguably within the zone protected by the constitutional guarantee invoked; (2) the litigant must show that the challenged legislation has or will cause her "injury in fact," injury that need

not be economic. *United States* v. *SCRAP*, 412 U.S. 669 (1973); see *Data Processing Service* v. *Camp*, 397 U.S. 150, 152-53 (1969).

It is beyond debate that the interest asserted by appellees to trial by fairly selected juries falls within the zone protected by the due process and equal protection guarantees of the fourteenth amendment. See *Carter* v. *Jury Commission*, 396 U.S. 320, 325, 330 (1970); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

Similarly, appellees representing female civil litigants are "injured in fact." They have a direct, personal stake in the outcome, assuring concrete adverseness in the presentation of this controversy. See *Baker* v. *Carr*, 396 U.S. 186, 204 (1962); *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). The system they attack destroys the possibility of representative juries in their pending actions, thereby denying them a right secured by the due process clause. See *Carter* v. *Jury Commission, supra*, 396 U.S. at 330 ("[d]efendants in criminal proceedings do not have the only cognizable legal interest in non-discriminatory jury selection"—once a state chooses to provide a jury "whether or not constitutionally required to do so, it must hew to federal constitutional criteria in ensuring [fair] selection"). Further, the challenged scheme denies them the evenhanded treatment secured by the equal protection clause: Louisiana's jury selection system assures that members of their sex, a substantial and identifiable class of citizens eligible for jury duty, will not be represented, even in token numbers. See *Frontiero* v. *Richardson, supra; Reed* v. *Reed*, 404 U.S. 71 (1971) ("dissimilar treatment for men and women who are similarly situated" violates equal protection).

Moreover, the likelihood of economic harm to appellees is substantial. Studies have shown that, in civil cases, juries dominated by one sex award larger damages to plaintiffs of that sex. Nagel & Weitzman, Women as Litigants, 23 Hastings L.J. 171, 192-97 (1971), at 196 summarizing Jury Verdict Research Corp., Personal Injury Valuation Handbooks 3676-87 (1966); cf. Note, 12 St. John's L.Rev. 172, 174 (1937) (automatic exemption for women tends to eliminate the most competent and intelligent females, while those least fitted to serve will do so—"the morbidly curious, the idle woman who finds time hanging heavily on her hands, the seeker of thrills").

In *United States* v. *SCRAP, supra,* this Court declared that standing is not to be denied simply because many people suffer the same injury, in *SCRAP,* harm to esthetic and environmental well-being. The formulation of Professor Davis was quoted with approval:

> The basic idea . . . is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.

Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613 (1968), cited in 412 U.S. at 689 n. 14. Surely the potential harm to appellees in exposure to unfairly selected juries is more than an "identifiable trifle"; it far surpasses the recreational and esthetic injury present in *SCRAP,* the fraction of a vote at stake in *Baker* v. *Carr, supra;* the five dollar fine and costs in *McGowan* v. *Maryland,* 366 U.S. 420 (1961); and the $1.50 poll tax in *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663 (1966).

Finally, as the court below held, appellees' challenge inevitably involves criminal as well as civil jury selection, for the very same mandatory state constitutional provision governs both. See 363 F.Supp. at 1113.

II.

The Louisiana Jury Selection System Discriminates Invidiously on the Basis of Sex in Violation of the Equal Protection Clause of the Fourteenth Amendment.

The gender criterion employed by Louisiana to determine inclusion of individuals in jury venires, a criterion operating to effect almost total absence of women from juries, violates the equal protection mandate in at least two basic respects. First, it violates the requirement that no cognizable group be excluded from jury service, a requirement essential to secure equal protection of the laws to members of that group both as litigants and as potential jurors. *Carter* v. *Jury Commission,* 396 U.S. 320 (1969). In addition, the scheme establishes a gender-based classification that stigmatizes all women, even those who do not wish to serve; in effect, Louisiana has decreed that male participation in the administration of justice is essential, female participation, expendable.

A. *Women are a cognizable group excluded from jury service by Louisiana's jury selection system.*

Exclusion of "identifiable segments of the community from jury panels and from juries ultimately drawn from those panels" denies equal protection to the excluded group, both as litigants and as potential jurors. *Apodaca* v. *Oregon,* 406 U.S. 404, 413 (1972); *Carter* v. *Jury Commission,*

supra. The excluded group, to be considered "identifiable" or "cognizable", must represent a "distinct class" in the community, for example, wage earners (*Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946)), daily laborers (*Labat* v. *Bennett*, 365 F.2d 698 (5th Cir. 1966)), non-alien Spanish-Americans (*United States* v. *Pentado*, 463 F.2d 355 (5th Cir. 1972)), atheists (*State* v. *Madison*, 240 Md. 265, 213 A.2d 880 (1965)). See also *Grimes* v. *United States*, 391 F.2d 709 (5th Cir. 1968); *McManaman* v. *United States*, 327 F.2d 21 (10th Cir. 1964).

Recognizing that "the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both," *Ballard* v *United States*, 329 U.S. 187, 193 (1946), courts have acknowledged that women are a "cognizable group" for purposes of jury service equal protection analysis. See *White* v. *Crook*, 251 F.Supp. 401 (M.D. Ala. 1966) (three-judge court); cf. *Peters* v. *Kiff*, 407 U.S. 493, 503-504 and n. 12 (1972). See also *Ballard* v. *United States*, *supra*; *Thiel* v. *Southern Pacific Co.*, *supra*; *United States* v. *Zirpolo*, 450 F.2d 564 (3d Cir. 1970) (substantial underinclusion of women on jury venires held impermissible on non-constitutional grounds).

The effect of La. Const. Art. VII, §41 has been stipulated. See pp. 3-4, *supra*. Although women constitute fifty-three percent of the Louisiana population eligible for jury service, the appearance of even one woman on a Louisiana state court jury is a rare event.* A significant variation between the proportionate size of a "discernible" group in the community and its proportionate

* Contrast recent experience in the federal court below, in which women and men are placed on venires on the same basis. See Appendix at 163-64.

size on the jury rolls demonstrates unconstitutional exclusion, *Hodnett* v. *Slayton*, 343 F.Supp. 1142 (W.D. Va. 1972), unless the variation is the product of chance. *Alexander* v. *Louisiana*, 405 U.S. 625, 630 (1971). The staggering variation here is obviously not the product of chance. It is the direct result of the "benign dispensation" accorded women by Louisiana law, a dispensation operating to block even token inclusion of females on juries.

In *Hoyt* v. *Florida*, 368 U.S. 57 (1961), this Court ranked women as a "class in the community" and acknowledged that a (former) Florida scheme indistinguishable from the one in the case at bar might have operated as an "exclusionary device". 368 U.S. at 61. But instead of applying the almost per se rule applied in other jury discrimination cases, the Court deferred to what it conceived to be the chivalrous intent of the legislature. *Hoyt* thus placed women in a class by themselves as the only "discernible" group whose absence from juries did not offend equal protection. As to the "rationality" of the supposed "favor" conferred on women by sparing them from jury duty, the court below in the instant case commented:

> If this were proper sauce for geese, there might be gander gravy too: states might with equal logic grant jury exemptions to all male wage earners who do not ask to serve, with the result that litigants, male and female, would be compelled in practice to submit to verdicts by predominantly female juries. Males might then properly question whether they were being afforded Equal Protection of the laws. 363 F.Supp. at 1114.

B. *Louisiana's "benign dispensation" serves to keep women in their place.*

In *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), this Court declined to perpetuate approval of legislative line-drawing based on gross generalization about the roles of men and women in the community. In *Reed*, the apparent premise of the legislature was that, in general, men have more business experience than women. *Reed* v. *Reed*, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970). *Frontiero* concerned, as this case does, the assumption that women are destined for the care of husbands, home and children, men for participation in the world outside the home. *Hoyt* rested on a lump judgment of the same order, that "woman is still regarded as the center of home and family life". 368 U.S. at 62.

Because the decision in *Hoyt* is impossible to reconcile with the new direction signalled in *Reed* and *Frontiero*, the court below determined that it was not obliged to follow "the outgrown dogma". 363 F.Supp. at 1117. State tax classifications apart, see *Kahn* v. *Shevin*, 42 U.S.L.W. 4591 (April 24, 1974), it is now plain that similarly situated adult men and women are constitutionally entitled to even-handed treatment by the law, and that "it is manifestly unfair to indulge in generalities when speaking of women, which no one would think of using when referring to men." Cottle, The Prejudice Against Women Lawyers: How Can It Be Overcome?, 21 Case & Com. 371 (1914).*

---

* In contrast to *Kahn* v. *Shevin*, where a majority of this Court regarded a gender line as a permissible response to past disadvantage, it should be inescapably clear to any "fairminded person" that the classification challenged here discriminates against at least some members of the group it purports to protect. See *Wiesenfeld* v. *Secretary of Health, Education and Welfare*, 367 F.Supp. 981, 991 (D.N.J. 1973); cf. *De Funis* v. *Odegaard*, 42 U.S.L.W. 4578, 4587 (1974) (dissenting opinion).

The analysis in *Hoyt* betrays "a view of woman's role which cannot withstand scrutiny under modern standards." *Alexander* v. *Louisiana*, 405 U.S. 625, 639-40 (1971) (concurring opinion). The "benefit" for "women only" of not having to serve on juries was surely no favor to Ms. Hoyt, on trial for second degree murder. Her crime was committed after an altercation in which she claimed her husband had insulted and humiliated her to the breaking point. Empirical evidence supports her assumption that members of her own sex would better understand her state of mind when she hit her husband over the head with a baseball bat, a blow which caused his death. See Nagel & Weitzman, *supra*, 23 Hastings L.J. at 192-97.

Nor has *Hoyt* proved a "favor" to other women litigants and potential jurors. See *De Kosenko* v. *Brandt*, 63 Misc. 2d 895, 898, 313 N.Y.S.2d 827, 830 (1970) (civil plaintiff who wants women on her jury should not complain to the court, challenging automatic exemption of females from service, but should address her lament to her sisters who prefer "television soap operas, bridge and canasta, the beauty parlor and shopping" to jury duty); *Goldblatt* v. *Board of Education*, 52 Misc. 2d 238, 275 N.Y.S.2d 550 (1966), *aff'd*, 57 Misc. 2d 1089, 294 N.Y.S.2d 272 (1968) (exclusion of compensation for female teachers who serve on juries, while male teachers receive full salary less jury fees is "reasonable" because men must serve, but women can avoid jury duty for the asking). See also opinions cited in Appellees' Motion to Affirm, *Edwards* v. *Healy*, No. 73-759, at 13-16.

Overlooked in *Hoyt* is the reality that jury service, more than voting, is not only a right, it is a statutory duty and

a "crucial citizen responsibilit[y]". *Broadway* v. *Culpepper*, 439 F.2d 1253 (5th Cir. 1971). Exclusion of women from this responsibility relegates them "to inferior legal status without regard to [their] actual capabilities." *Frontiero* v. *Richardson, supra*, 411 U.S. at 687. The brand placed upon them adversely affects all members of the class, even those who do not wish to participate. *Peters* v. *Kiff, supra*, 407 U.S. at 499. See also *State* v. *Daniels*, 262 La. 475, 491, 263 So.2d 859, 864 (1972) (dissenting opinion).

Appraising *Hoyt*, its predecessors and its progeny, two commentators who identified themselves as "middle-aged, white males . . . of the subspecies 'law professor'," observed:

> How then is it possible to maintain that an exemption for every woman—including even the childless, single woman, and the working wife or mother—is not an arbitrary discrimination when based solely on her sex? Such a scheme . . . is based—and court opinions right up to the present day support our contention—on an additional assumption: that women are delicate creatures to be encouraged to stay at home and be protected from the hard, cruel world—and incidentally, as long as they *are* at home, to do the cooking, cleaning, mending and ironing for those of us who do have the affairs of the world to attend to.

Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675, 708-721 (1971).

III.

By Destroying the Possibility That the Jury Will Reflect a Representative Cross-Section of the Community, the Louisiana Jury Selection System Infringes a Fundamental Right and Violates the Due Process Clause of the Fourteenth Amendment.

Strict judicial scrutiny is required in this case not only because the classification established by La. Const. Art. VII, §41 is invidious or suspect, but also because it infringes a fundamental right, *Memorial Hospital* v. *Maricopa County*, 94 S. Ct. 1076 (1974), one "explicitly or implicitly guaranteed by the Constitution." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973).

Due process of law, and the "American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946). See also *Brown* v. *New Jersey*, 175 U.S. 172, 175 (1899); *Smith* v. *Texas*, 311 U.S. 128, 130 (1941) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community"). Moreover, the right to a petit jury in a criminal trial, impartially drawn from a representative cross-section of the community, is guaranteed not only by the due process clause itself, but explicitly by the sixth amendment, made applicable to the states by the fourteenth amendment. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

In concluding that Louisiana's jury selection system lacks an essential element of due process, the court below relied upon this Court's illumination in *Peters* v. *Kiff*:

> [E]xclusion of a discernible class from jury service . . . destroys the possibility that the jury will reflect a representative cross-section of the community. 407 U.S. at 500.
>
> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. 407 U.S. at 504.

Following the analysis and identification of due process values presented in *Peters* v. *Kiff*, the court below reasoned:

> A jury panel that is almost entirely male, whether because females are excluded or because they serve only if they volunteer and almost none step forward, cannot be "truly representative of the community," and women's absence does "violence to the democratic nature of the jury system." The jury must not merely mirror the American male, just as it must not reflect the views of only one race or one stratum of society. 363 F.Supp. at 1116.

As is true of absence of members of a particular racial or ethnic group, absence of women from jury panels

> is significant not because all women react alike, but because they contribute a distinctive medley of views influenced by differences in biology, cultural impact and life experience, indispensable if the jury is to comprise a cross-section of the community. 363 F.Supp. at 1115.

While Louisiana's "benign dispensation" impacts with special severity on women litigants, see Nagel & Weitzman, Women as Litigants, 23 Hastings L.J. 171 (1971) and p. 8 *supra*, the scheme injures males as well. Indeed, the effects of the system are "too subtle and too pervasive to admit of confinement to particular issues or particular cases." *Peters* v. *Kiff*, *supra*, 407 U.S. at 503.*

IV.

The Gender Criterion Employed by Louisiana to Determine Inclusion of Individuals in Jury Venires Bears No Fair and Substantial Relationship to Any Legitimate State Objective.

Two justifications might be urged in support of the classification challenged by appellants: administrative convenience and ensuring care and supervision of home and children. Both figured in this Court's determination in *Hoyt* that legislation virtually assuring overwhelmingly male juries was constitutionally permissible. "[H]istoric public policy" placed women at home; the legislature might proceed on the unsupported assumption that women would burden the court with requests for exemption were they placed on jury rolls on the same basis as men. 368 U.S. at 63.

But the *Hoyt* image of women "as the center of home and family life," of dubious accuracy for many women in

---

* Cf. White, Selecting the Jury, in Appleman, Successful Jury Trials 123 (1952) ("If you are representing an attractive young woman, have as many men jurors, old or young, as possible").

1961, is today recognized as a gross generalization of the same order as the familiar stereotypes firmly rejected as a basis for legislative line-drawing in *Frontiero* and *Reed*.

Legislative division of adult members of the community into two distinct classes, men functioning outside the home, women centered within it, no longer accords with reality for a substantial and growing portion of the population. By 1973, more than 33 million women, including 52.3% of all women between 18-64 years old, were in the labor force. Women's Bureau, U.S. Department of Labor, Women in the Labor Force (Nov. 1973). Forty-two percent of women workers worked full-time the year round; 58.5% were married and living with their husbands. Women's Bureau, U.S. Department of Labor, Highlights of Women's Employment and Education (1973). In 1972, 26.9% of the mothers with children under three years old were in the labor force; 36.1% of mothers with children 3-5 years old were gainfully employed; 50.2% of women with children 6-17 years old were in the labor force. Hayghe, Labor Force Activity of Married Women, U.S. Department of Labor, Monthly Labor Review, Table 4, at 34 (April 1973).

Statistics for Louisiana mirror those for the nation generally. The 1970 Census of the Population reports the following figures for Louisiana:

PERCENT OF FEMALES IN THE LABOR FORCE

Age	*Percent*
16 and 17 years	11.8
18 and 19 years	35.9
20 and 21 years	47.2
22 to 24 years	51.7
25 to 34 years	44.5
35 to 44 years	48.2
45 to 64 years	44.0

Bureau of the Census, 1970 Census of Population, General Social and Economic Characteristics, Final Report PC(1)—C20—Louisiana 195. Moreover, of Louisiana's total adult female population, more than 59% had no children under the age of 18. And of the 41% with children under 18, nearly 37% were in the labor force. *Id.* Thus, for nearly three-fourths of the female population covered by Louisiana's "benign dispensation", child care is not a factor determining involvement in civic responsibilities or employment outside the home.

Brief for Appellants at 7 announces that 67.2% of Louisiana women were not in the labor force in 1970. Not disclosed by appellants is the fact that this figure includes females from the age of 14 years. The large adolescent population included in the statistic surely should not be counted for the purpose at hand: none of these adolescents meets age requirements for jury service; this population group is insignificantly represented in the labor force due to school attendance, not occupation at home. The source cited by appellants, read in its entirety, presents a very different picture. It discloses that over 43% of Louisiana women with children between the ages of six to seventeen are working, and that over half of all Louisiana women workers 25 to 59 years of age work full-time the year round. Holton, Administrator, Commission on the Status of Women, State Department of Labor of Louisiana, Women Workers in Louisiana, 1970, at 1, 10, 13, 55 (July 1972).

In short, the supposition that it would be inconvenient to call women for jury duty because most of them are confined at home has no substantial basis in fact. Moreover, experience in the federal courts* and in the thirty

* See 28 U.S.C. §1862; *United States* v. *Zirpolo*, 450 F.2d 424 (3d Cir. 1971).

states that administer jury selection statutes which are nondiscriminatory on their face* suggests that the administrative convenience justification is fanciful. In any event, administrative convenience was precisely the rationale for sex-based classification held insufficient in *Reed* and *Frontiero*:

> [A]ny statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution] . . . ." *Reed* v. *Reed, supra,* at 77, 76.

Frontiero, supra, 411 U.S. at 690.

As a means to ensure that young children are not left without caretakers when their parents are called for jury duty, the scheme is appallingly overbroad and stereotypically underinclusive. It fails to cover men with home and child care responsibilities, among them, widowed fathers and husbands with incapacitated wives. For these

* *See* Alaska Stat. §§9.20.010, 9.20.030; 7 Ariz. Rev. Stat. Ann. §§21.201, 21.202; 3B Ark. Stats. Ann. §§39.101 *et seq.;* 13 Cal. Code Civ. Pro. §§198 *et seq.;* 4 Colo. Rev. Stat. Ann. §§78-1 *et seq.;* 10 Del. Code Ann. §§4505 *et seq.;* 7 Hawaii Rev. Laws §§609-1 *et seq.;* 2 Idaho Code Ann. §§2-201 *et seq.;* Ill. Ann. Stat. ch. 78 §§1 *et seq.* (Smith-Hurd); Ind. Ann. Stat. §4-7115; Iowa Code Ann. §§607.1 *et seq.;* 3A Kan. Stat. Ann. §§43-155 *et seq.;* 1 Ky. Rev. Stat. §§29.025, 29.035; 14 Me. Rev. Stat. Ann. §§1201 *et seq.;* 5A Md. Ann. Code art. 51, §§1 *et seq.;* Mich. Comp. Laws Ann. §§600.1306, 600.1307; 2 Miss. Code Ann. §§1762 *et seq.;* 7 Mont. Rev. Codes Ann. §§93-1301 *et seq.;* 1 Nev. Rev. Stat. §§6.010 *et seq.;* 2A N.J. Rev. Stat. §§69-1, 69-2; 4 N.M. Stat. Ann. §§19-1-1 *et seq.;* 1B N.C. Gen. Stat. §§9-3 *et seq.;* 5 N.D. Cent. Code §§27-09.1 *et seq.;* 1 Ore. Rev. Stat. §§10.010 *et seq.;* 17 Pa. Stat. §1279; 7 S.D. Code §§16-13-10 *et seq.;* Vt. Stat. Ann. tit. 12, App. VII, Pt. 1, R.25 §27; 2 Va. Code Ann. §§8-208.2 *et seq.;* W. Va. Code Ann. §§52-1-1 *et seq.;* Wis. Stat. Ann. §§255.01, 270.16.

men, jury service may be far more burdensome than it is for many women. It covers childless women, women whose children are grown,* and women who have made arrangements for their children's care. Far more appropriate means are available to further a genuine concern with respect to child care. For example, recognizing that child rearing is a function either parent can perform, New Jersey and Montana exempt any individual who has custody of and personally cares for a child. N.J.S.A. 2A:69-2(g); Rev. Codes of Mont. Sec. 93-1304(12).

In sum, Louisiana's jury selection scheme, remnant of "the historical male prejudice against female participation in activities outside the family circle," Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675, 718-21 (1971), is at best misguided chivalry. In failing to recognize adult females as persons with full civic responsibilities as well as rights, Louisiana's system betrays a view of women ultimately harmful to them. See Davidson, Ginsburg & Kay, Text, Cases and Materials on Sex-Based Discrimination 30-35 (1974). By keeping women off the jury rolls unless they volunteer, Louisiana hardly assists its female citizens to view themselves and be viewed by others as full-fledged participants in community affairs. Rather, the state types women as persons whose assistance in the administration of justice is not really needed by the community.**

* 57.9% of all unemployed married women have no children under the age of 18. Statistical Abstract of the United States 1972, 220 (93d ed.).

** On the consequences of sex typing for Louisiana women in the labor force, see Holton, Administrator, Commission on the Status of Women, State Department of Labor of Louisiana, Women Workers in Louisiana, 1970 (July 1972).

Nor does the fact that a woman may volunteer insulate the state from responsibility for the invidious effect of the classification. "[N]either men nor women can be expected to volunteer for jury service." *Alexander* v. *Louisiana*, 405 U.S. 625, 643 (1971) (concurring opinion). Most individuals, male or female, will avoid a time-consuming civic task, given the opportunity.

By maintaining the gender-based selection system, Louisiana ensures perpetuation of unrepresentative juries and conditions for the administration of justice that are less than optimal. Thus the injury the "benign dispensation" inflicts is not limited to women. "[T]here is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U.S. 187, 195 (1945).

CONCLUSION

For the reasons stated above, the decision of the court below should be affirmed.

Respectfully submitted,

RUTH BADER GINSBURG
MELVIN L. WULF
KATHLEEN PERATIS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

GEORGE M. STRICKLER, JR.
344 Camp Street
Suite 1100
New Orleans, Louisiana 70130
Attorneys for Appellees

May, 1974

Attorneys for appellees gratefully acknowledge the assistance provided in preparation of this brief by Jonathan Warner, third year student at Columbia Law School.